(4)

No. 03-1397

Supreme Court, U.S.
FILED
MAY 7 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CIVIL LIBERTIES FOR URBAN BELIEVERS, CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, CHURCH ON THE "WAY" PRAISE CENTER, AND MONTE DE SION (MOUNT ZION) CHURCH,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
SUZANNE M. LOOSE *
Assistant Corporation Counsel
Suite 800
30 North LaSalle Street
Chicago, Illinois 60602
(312) 744-4439

* Counsel of Record

Attorneys for Respondent

BEST AVAILABLE COPY

WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the Equal Protection Clause requires any form of heightened scrutiny for a zoning law that treats religious land use as a separate zoning classification and confines religious land use to specified zoning districts.

2. Whether a zoning law imposes a substantial burden on the free exercise of religion when it permits religious land use as a matter of right in residential zoning districts and provides for religious land use by a special use permit that is liberally granted in commercial and business zoning districts.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	5
I. RATIONAL BASIS SCRUTINY APPLIES TO AN EQUAL PROTECTION CHALLENGE OF A ZONING ORDINANCE THAT REGULATES RELIGIOUS LAND USE	6
II. THE CONFLICT AMONG THE CIRCUITS ABOUT THE CONTOURS OF HYBRID RIGHTS PROVIDES NO BASIS FOR PLENARY REVIEW	17
III. A ZONING ORDINANCE THAT LEAVES OPEN REASONABLE LOCATION OPPORTUNITIES FOR A CHURCH IMPOSES NO SUBSTANTIAL BURDEN ON RELIGION	21
CONCLUSION	28

TABLE OF AUTHORITIES

CASES	Page
American Communications Association v. Douds, 339 U.S. 382 (1950)	27
Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004)	18, 20
Board of Trustees v. Garrett, 531 U.S. 356 (2001)	11
Brown v. Hot, Sexy & Safer Products, Inc., 68 F.3d 525 (1st Cir. 1995), cert. denied, 516 U.S. 1159 (1996)	19
Califano v. Westcott, 443 U.S. 76 (1979)	16
Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004)	20
Christian Gospel Church v. City & County of San Francisco, 896 F.2d 1221 (9th Cir.), cert. denied, 498 U.S. 999 (1990)	12, 22
Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)	19, 24
City of Boerne v. Flores, 521 U.S. 507 (1997)	4
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)	*passim*
City of Colorado Springs v. Blanche, 761 P.2d 212 (Colo. 1988)	23
Congregation Kol Ami v. Abington Township, 309 F.3d 120 (3d Cir. 2002)	12, 13
Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991)	12, 13, 18
Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823 (Cal. Ct. App.), appeal dismissed, 338 U.S. 805 (1949)	26, 27
Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 86 P.3d 1140 (Or. Ct. App. 2004)	23

TABLE OF AUTHORITIES—Continued

	Page
Employment Division v. Smith, 494 U.S. 872 (1990)	*passim*
First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992)	24
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)	6
Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983)	22
Heckler v. Mathews, 465 U.S. 728 (1984)	16
Hernandez v. Commissioner, 490 U.S. 680 (1989)	21, 25
Hoover v. Ronwin, 466 U.S. 558 (1984)	8
Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988)	24
Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378 (1990)	25
Kissinger v. Board of Trustees, 5 F.3d 177 (6th Cir. 1993)	19
Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir.), cert. denied, 464 U.S. 815 (1983)	22-23
Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003)	19
Locke v. Davey, 124 S. Ct. 1307 (2004)	*passim*
Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989)	14
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)	7
Memphis Community School District v. Stachura, 477 U.S. 299 (1986)	16
Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988), cert. denied, 490 U.S. 1005 (1989)	22

TABLE OF AUTHORITIES—Continued

Page

Midrash Sephardi, Inc. v. Town of Surfside, No. 03-13858, 2004 WL 842527 (11th Cir. Apr. 21, 2004) 12, 13, 22
Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) 20
Minney v. City of Asuza, 330 P.2d 255 (Cal. Ct. App. 1958) 23
North Pacific Union Conference Association v. Clark County, 74 P.3d 140 (Wash. Ct. App. 2003) 23
Orr v. Orr, 440 U.S. 268 (1979) 16
Personnel Administrator v. Feeney, 442 U.S. 256 (1979) 10
Rector, Wardens, and Members v. City of New York, 914 F.2d 348 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991) 22
Reed v. Reed, 404 U.S. 71 (1971) 6-7
San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004) 22
Sherbert v. Verner, 374 U.S. 398 (1963) 25, 26
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 8
Swanson v. Guthrie Independent School District No. I-L, 135 F.3d 694 (10th Cir. 1998) 20
Tenafly Eruv Association v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002), cert. denied, 123 S. Ct. 2609 (2003) 19
Thiry v. Carlson, 78 F.3d 1491 (10th Cir.), cert. denied, 519 U.S. 821 (1996) 23
Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692 (9th Cir. 1999), vacated as unripe, 220 F.3d 1134 (2000) (en banc) 18, 20, 21
Thomas v. Review Board, 450 U.S. 707 (1981) 26
United States v. Lee, 455 U.S. 252 (1982) 10

TABLE OF AUTHORITIES—Continued

	Page
Vance v. Terrazas, 444 U.S. 252 (1980)	17-18
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	10
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	6
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	14
Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980)	16
CONSTITUTION, STATUTE, RULE, AND ORDINANCES	
U.S. Const. amend. I	*passim*
U.S. Const. amend. XIV	*passim*
42 U.S.C. § 2000cc (2000)	4
Sup. Ct. R. 14.1(a)	16
Municipal Code of Chicago, Ill. § 17-6.4-2 (2003)	9
Municipal Code of Chicago, Ill. § 17-11.9-1 (2003)	3
Municipal Code of Chicago, Ill. § 17-11.10-4 (2003)	2
Municipal Code of Chicago, Ill. § 17-11.10-7.5 (2003)	2

IN THE

Supreme Court of the United States

No. 03-1397

CIVIL LIBERTIES FOR URBAN BELIEVERS, CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, CHURCH ON THE "WAY" PRAISE CENTER, AND MONTE DE SION (MOUNT ZION) CHURCH,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

The Chicago Zoning Ordinance divides the City into several broad use districts, including "R" for residential; "B" for business; "C" for commercial; and "M" for manufacturing. R. 125 ¶ 5. Churches are permitted uses in all R districts. *Id.* ¶ 7. The majority of property available for development is zoned R. *Id.* ¶ 14. By allowing churches as permitted uses in R districts, the zoning ordinance recognizes the traditional role that churches have played in residential communities, where their presence is an important amenity that adds to the quality of life and prosperity of those commu-

nities. *Ibid.* Because of their function as places of worship and spiritual inspiration, churches provide essential public services to neighborhoods. *Ibid.*

Churches are special uses in all B districts as well as in all but one of the C districts. R. 125 ¶ 7. Special uses require approval from the Chicago Zoning Board of Appeals ("ZBA"). *Id.* ¶ 6. Ordinarily, an applicant for a special use permit must show that its use is "necessary for the public convenience"; that the public health, safety, and welfare will be protected; that the use will not substantially injure the value of neighboring property; and that the use conforms with other applicable provisions of the code. See Municipal Code of Chicago, Ill. § 17-11.10-4 (2003). A church applicant is not required to demonstrate that the proposed use is "necessary for the public convenience at that location." *Id.* § 17-11.10-7.5. In addition, an application for a special use permit by churches only will be considered granted if the ZBA does not render a decision within 120 days. *Ibid.*

Within B and C districts, the zoning ordinance allows churches only as special uses because churches are not always a good fit. R. 125 ¶ 15. The goals of such districts are to provide retail and commercial services to residents and to foster economic growth. *Ibid.* The use of land in B and C districts for noncommercial purposes limits commercial development by occupying land that would otherwise be available for commercial uses and interrupting contiguous and interdependent commercial zones, *i.e.*, a street or series of streets that attracts "retail traffic" based on the concentration of commercial businesses. *Id.* ¶ 16. In addition, given the nature of certain church activities, including the need for quiet and programs for children, the City Council determined that churches should be kept apart from certain commercial businesses and excluded from more congested commercial streets. *Id.* ¶ 17. The zoning ordinance recog-

nizes that there are exceptions to these general rules, and thus allows churches to locate in B and C districts by obtaining special use permits. *Id.* ¶ 18.

Churches are restricted from C4 and M districts because their use is incompatible with the commercial and manufacturing uses there, which often create noise, dust, and traffic. R. 124 ¶ 17. To use property in a manner that is not a permitted or special use, the owner must obtain a map amendment changing the zoning classification. See Municipal Code of Chicago, Ill. § 17-11.9-1 (2003).

Since an amendment to the ordinance enacted on February 16, 2000, clubs, lodges, meeting halls, recreation buildings, and community centers are treated like churches in B, C, and M districts—they must obtain special use permits to locate in B and C districts and are not allowed at all in M districts. R. 125 ¶¶ 8-9. In R districts, recreation buildings and community centers are special uses; some clubs and lodges are permitted in some R districts and not others; and meeting halls are neither permitted nor special uses. *Id.* ¶ 10.

A vast number of churches have been able to find locations in the City. The 1999 Yellow Pages for the City of Chicago lists the phone numbers and addresses of more than 2000 churches, synagogues, and mosques in the City. R. 152 ¶ 2. Between October 1997 and July 2000, the ZBA granted 36 special use permits for churches to locate in B and C districts and 18 special use permits for existing churches to expand in R, B, and C districts. *Id.* ¶ 1. Each individual church plaintiff in this case has found a home in the City limits, either by locating in an R district or by obtaining a special use permit in a B or C district. *Id.* ¶ 3.

Petitioners, Civil Liberties for Urban Believers and five individual churches, filed a complaint to challenge the zoning ordinance's restrictions on church location. R. 1. Petitioners' fourth amended complaint alleged that these restrictions

violate sections 2(a) and 2(b) of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc (2000), as well as the Equal Protection, Free Exercise, Free Speech, and Due Process Clauses of the United States Constitution. R. 147. After discovery, the district court granted the City's motion for summary judgment. Pet. App. 43a.

The court of appeals affirmed. Pet. App. 1a. The court of appeals rejected petitioners' claims under RLUIPA, reasoning that compliance with the City's zoning ordinance does not substantially burden churches in violation of section 2(a), and that the 2000 amendment to the zoning ordinance, placing churches on equal footing with nonreligious assembly uses, complies with RLUIPA's section 2(b). Pet. App. 13a-15a.[1] The court also rejected each of petitioners' attacks on the facial constitutionality of the ordinance. The court held that petitioners' facial challenge to the zoning ordinance under the Free Exercise Clause fails because the zoning ordinance, which does not aim to inhibit religion and applies to all land uses in the City, is a neutral law of general applicability. Pet. App. 18a-19a. The court also held that the special use, map amendment, and planned development processes are not systems of individualized exemptions from generally applicable law that trigger heightened scrutiny. Pet. App. 18a. And the court rejected petitioners' argument that this case involves hybrid rights that would require heightened scrutiny because petitioners have identified no other constitutionally protected right that is infringed by the zoning ordinance. Pet. App. 19a. The court also found petitioners' free speech and free assembly claims without merit because the zoning ordinance is a valid time, place, and manner restriction that

---

[1] Having rejected petitioners' RLUIPA claims, the court found it unnecessary to reach our submission that RLUIPA exceeds the scope of congressional authority to enforce the Fourteenth Amendment. See Pet. App. 15a. See generally *City of Boerne v. Flores*, 521 U.S. 507 (1997).

leaves ample opportunity for churches to locate in Chicago. Pet. App. 20a-21a. Turning to petitioners' equal protection claim, the court held that, because this case involves neither a suspect classification nor a fundamental right, the zoning ordinance should be reviewed under the rational basis test and that the challenged restrictions on church use are rationally related to legitimate land use objectives. Pet. App. 21a-23a. Finally, the court rejected petitioners' due process claim, holding that the legislative process provides churches with all the process that is due. Pet. App. 24a.[2]

Judge Posner dissented on the equal protection issue only. Pet. App. 25a. Judge Posner stated that a higher level of scrutiny is required because *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), "instantiates though it does not articulate the proposition that discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities." Pet. App. 28a. Judge Posner then opined that a higher level of scrutiny is warranted in this case because churches are a sensitive land use and Chicago's zoning ordinance discriminates against "new, small or impecunious churches." Pet. App. 29a.

ARGUMENT

Chicago's zoning ordinance treats religious land use liberally. Churches may locate as a matter of right in any R district, where there is the most land available for development. Churches may also locate in all B and most C districts if they obtain special use permits, which are granted liberally. Thousands of churches have opened in Chicago,

---

[2] The court also rejected a claim brought on behalf of one of the individual plaintiffs, His Word, that the zoning ordinance was not neutrally applied to its application for a zoning amendment, holding that there was no evidence that the City Council acted with an illicit motivation in rejecting the application. Pet. App. 18a.

including petitioners' churches. Neither the terms of the zoning ordinance nor its practical application has served as an impediment to religion in general or to the individual churches in this case.

Petitioners claim that plenary review is warranted because the circuits are in conflict on the proper standards to be applied to regulation of religious land use. While petitioners seize on minor variations in the way various circuits have defined the standard of review, these differences have no substance. No circuit applies any form of heightened scrutiny to zoning laws merely because they treat religious land use as a separate zoning category and confine religious land use to specified zoning districts, and no circuit holds that a zoning law imposes an impermissible burden on religion merely because it is likely to make it more difficult or expensive for a church to locate—all zoning laws do that.

Chicago's zoning ordinance rationally treats churches differently from secular uses of land. Religion has no secular equivalent, and Chicago's ordinance actually treats churches more liberally than secular assembly uses. Nor do the fact-bound details of Chicago's regulation of religious land use merit this Court's review. The petition should be denied.

I. RATIONAL BASIS SCRUTINY APPLIES TO AN EQUAL PROTECTION CHALLENGE OF A ZONING ORDINANCE THAT REGULATES RELIGIOUS LAND USE.

Zoning laws are regarded as "economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' and bears a 'rational relationship to a (permissible) state objective.'" *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (citations omitted) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), and *Reed v. Reed*, 404 U.S.

71, 76 (1971)). Accordingly, in *Cleburne*, this Court held that a zoning law should ordinarily be upheld as long as it is supported by a rational basis. See 473 U.S. at 440-42. Following *Cleburne*, the court of appeals in this case held that petitioners' equal protection attack on the Chicago Zoning Ordinance was subject to rational basis scrutiny. See Pet. App. 21a-22a.

Petitioners argue that something more than rational basis review is required here because this case involves a "sensitive use" and discriminates in favor of well-established churches. See Pet. 10-13.[3] This case is not an appropriate vehicle to consider petitioners' novel argument for several reasons. First, the argument is waived. It was not advanced below and is not supported by the record. Second, petitioners' claim ignores settled precedent rejecting heightened scrutiny based only on the disproportionate impact that a challenged law may have on minorities. Third, the holding below is not in

---

[3] Petitioners make a cursory suggestion that a law that treats religious land use as a separate zoning classification is suspect and therefore subject to strict scrutiny. See Pet. 14 n.4. The Court's recent decision in *Locke v. Davey*, 124 S. Ct. 1307 (2004), quickly lays this argument to rest. There, the State of Washington singled out religious students for different treatment, excluding them from access to state scholarship funds. See *id.* at 1310. The Court held that, under the Equal Protection Clause, only rational basis scrutiny was required. See *id.* at 1312 n.3. This decision followed from the Court's earlier decisions, which have found a class to be suspect or quasi-suspect only where it has experienced the type of "history of purposeful unequal treatment" or "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). Accord, *e.g.*, *Cleburne*, 473 U.S. at 441-42. While a law targeting a particular religion or group of believers might meet these criteria, a classification that treats all religions the same plainly does not. And while petitioners claim that some circuits have "suggested that religion may be a suspect class" (Pet. 14 n.4), no circuit has ever reached such a conclusion. Nor is any circuit likely to so hold in light of this Court's holding in *Locke*.

conflict with either the Court's decision in *Cleburne* or the law in any other circuit. Uniformly, the courts of appeals have followed *Cleburne* and applied rational basis review to equal protection challenges of religious land-use regulation.

1. Petitioners' argument for heightened scrutiny is cribbed from Judge Posner's dissent, which claimed that the usual rational basis test was not sufficient because churches are a "sensitive use" and Chicago's zoning ordinance "discriminates in favor of well-established sects." Pet. App. 29a. Until this argument made its debut in Judge Posner's dissenting opinion below, however, petitioners had never argued for some heightened version of rational-basis review, and had never claimed that the Chicago Zoning Ordinance favored particular sects, denominations, or churches. Petitioners argued instead for strict scrutiny on the grounds that a fundamental First Amendment right was at stake and that the Chicago Zoning Ordinance's treatment of religious land use created a suspect classification; otherwise, they confined their equal protection arguments to review under the traditional rational-basis test. Arguments that have not been raised below are waived. See, *e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55 n.4 (2002). Nor will the Court consider arguments not advanced until a petition for rehearing is filed in the court of appeals. See, *e.g.*, *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984).

Petitioners' failure to claim that the Chicago Zoning Ordinance discriminates against "new, small, or impecunious churches" (Pet. App. 29a), makes this case particularly unsuitable for review because this assertion was not the object of the parties' evidentiary submissions. Therefore, a claim of discriminatory treatment is not supported by the record. For example, Judge Posner opined that well-established sects are treated more favorably by the ordinance because the established sects acquired land "in residential areas when such land was relatively cheap and abundant, and therefore

affordable by noncommercial entities," and because older churches that have been grandfathered in commercial zones "have managed to get permission to build over the years in nonresidential zones." Pet. App. 29a. Judge Posner also believes "new, small, or impecunious churches" are not likely "to have the resources necessary for building [a] place of worship in a residential area other than a slum . . . ." Pet. App. 29a-30a. But the record supports none of these assertions. The record contains no studies or testimony about whether residential land was more affordable than commercial property when established sects located their churches, or even about the relative cost of comparable residential and commercial properties today. Nor is there any reason to believe no established sect needs a new church for many of the same reasons that new sects are searching for a place to locate—*e.g.*, because they have outgrown old facilities, desire a better location, or are attracting different congregants. These congregations, therefore, would face the same exact obstacles as new churches. So, too, the idea that grandfathered churches are treated more favorably when they seek to expand churches in commercial areas is wholly unfounded. The zoning ordinance, on its face, does not exempt these churches, which must apply for permits that are reviewed under the same criteria as any other church when they seek to expand in ways that do not conform to current zoning. See Municipal Code of Chicago, Ill. § 17-6.4-2 (2003). If anything, the record discloses that all kinds of applications for special use permits are liberally granted, to old and new denominations alike, whether for expansion of an old church or the opening of a new church. R. 152, Exh. A.

Perhaps, in another case, a plaintiff might be able to prove that confining religious land use to residential zoning districts has a discriminatory impact on particular denominations, sects, or churches. No such claim, however, has been made or supported in this case.

2. Judge Posner's dissent urges heightened review not on the basis of any distinction found on the face of the zoning ordinance—which treats all religious land use the same—but based on a perceived discriminatory impact. This view flies in the face of the Court's settled precedent holding that even when a law disproportionately disadvantages a protected minority, the Equal Protection Clause does not require heightened scrutiny merely because of that disproportionate burden. See, *e.g. Personnel Administrator v. Feeney*, 442 U.S. 256, 271-72 (1979); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-66 (1977).

Judge Posner's view is also at odds with this Court's decisions under the First Amendment's Free Exercise Clause. Generally applicable laws frequently impose disproportionate burdens on new or nontraditional religions; in *Employment Division v. Smith*, 494 U.S. 872 (1990), for example, the law at issue proscribed the ingestion of peyote, even when used "for sacramental purposes at a ceremony of the Native American Church." *Id.* at 874. At issue in *United States v. Lee*, 455 U.S. 252 (1982), was an Amish believer's claim to an exemption from the payment of social security taxes on the ground that his religion forbade him to support governmental programs. See *id.* at 258-60. These cases both involved laws that effectively discriminated only against minority sects, and yet in both cases this Court held that no heightened scrutiny was warranted. See *Smith*, 494 U.S. at 878-80; *Lee*, 455 U.S. at 258-61. Surely, if minority sects were entitled to heightened constitutional protection against neutral and generally applicable laws because they impose disproportionate burdens on those denominations, the source for such protection would be the Free Exercise Clause; and yet heightened scrutiny on this basis has been rejected. There is no reason to read the Equal Protection Clause as providing more protection for religious exercise than does the Free Exercise Clause.

3. The court of appeals' holding is supported by this Court's decision in *Cleburne*, which rejected an argument that heightened review should be applied when a zoning law blocks an especially sensitive or important use of land. After deciding that mentally retarded persons bear none of the indicia of a suspect or quasi-suspect classification, the Court held: "To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be *rationally related to a legitimate governmental purpose.* . . . The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction *arbitrary or irrational.*" 473 U.S. at 446 (emphasis added). See also *Board of Trustees v. Garrett*, 531 U.S. 356, 366 (2001) (characterizing *Cleburne* as imposing "only the minimum 'rational basis' review"). The zoning restrictions there, however, did not survive rational basis scrutiny because none of the city's reasons plausibly explained why homes for the mentally retarded should be treated differently than similar residential uses. See 473 U.S. at 448-50. This led the Court to conclude that the zoning law "rest[s] on an irrational prejudice against the mentally retarded . . . ." *Id.* at 450. That holding has no application here.

In this case, even petitioners do not contend that the Chicago City Council harbors prejudice against religion. Surely Chicago's zoning ordinance does not reflect an irrational prejudice against religion in general or new denominations in particular. The ordinance is facially neutral, giving all religious denominations and sects equal opportunities to locate in Chicago. The ordinance reflects no prejudice against religion; even Judge Posner acknowledged that "Chicago is not dominated by atheists." Pet. App. 28a. The ordinance leaves ample opportunities for religious land use in Chicago. Indeed, thousands of churches operate in Chicago, including petitioners' churches. In fact, the zoning ordinance treats churches considerably more favorably than secular

assembly uses—churches, and no other assembly use, have free access to residential districts, where the majority of land in Chicago is available for development. There is accordingly no justification for heightened review—much less invalidation—of the ordinance.

4. Petitioners have identified no conflict among the circuits. No circuit has held that the Equal Protection Clause requires heightened review for laws regulating religious land use. In fact, all circuits that have addressed a church's equal protection challenge to a zoning ordinance have applied bare rational basis review. See *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 133 (3d Cir. 2002); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471 (8th Cir. 1991); *Christian Gospel Church v. City & County of San Francisco*, 896 F.2d 1221, 1225 (9th Cir.), cert. denied, 498 U.S. 999 (1990). Moreover, debate over the scope of review applicable to laws that treat religious and secular activities differently should be ended by this Court's recent decision in *Locke v. Davey*, 124 S. Ct. 1307 (2004), in which the Court held that a state statute barring scholarship aid for theology students is subject to only "rational-basis scrutiny" under the Equal Protection Clause. See *id.* at 1312 n.3. Curiously, the petition in this case was filed more than a month after *Locke* was decided; and yet petitioners say nothing about that case.[4]

---

[4] Since the petition was filed, the Eleventh Circuit has invalidated a zoning provision that treated religious assemblies differently from secular ones under RLUIPA's section 2(b). See *Midrash Sephardi, Inc. v. Town of Surfside*, No. 03-13858, 2004 WL 842527 at *22 (11th Cir. April 21, 2004). The court added that section 2(b), in its view, codified constitutional standards. See *id.* at *14 ("unequal treatment indicates the ordinance improperly targets the religious character of an assembly," requiring strict scrutiny); *id.* at *20 ("government action that specifically targets religion or religious conduct for distinctive treatment can be an impermissible intrusion on an individual's free exercise rights"). Petitioners, however, do not seek review of the Seventh Circuit's rejection

Petitioners claim that the decisions in *Cornerstone* and *Congregation Kol Ami* support some form of heightened scrutiny for their equal protection claim. That view is meritless. In *Cornerstone*, a church challenged a zoning law that excluded churches from the central business district. The Eighth Circuit began its analysis of the church's equal protection claim with the observation that "we must consider whether the City has a rational basis to differentiate between the Church and the entities it permits in the C-3 zone." 948 F.2d at 471. The court held that the exclusion of churches, while allowing other non-commercial uses, was not rationally related to the objective of accommodating liquor licensees, which were not allowed in residential districts, because some of the other non-commercial uses allowed did not have liquor licenses. See *ibid.* The claim was remanded so that the city could "provide the rational basis for this apparent unequal treatment of similarly situated entities." *Ibid.* Petitioners emphasize the court's statement that the zoning restriction "must be relevant" to the city's objectives (see Pet. 11), but that is merely another formulation of rational basis scrutiny.

Similarly, in *Congregation Kol Ami*, a synagogue challenged a zoning law that restricted religious land use in a residential district, and the Third Circuit applied what it characterized as a "very forgiving standard of review" (309 F.3d at 135), acknowledging that, under *Cleburne*, "absent . . . animus or other improper motive, a land use ordinance will typically be upheld." *Ibid.* The court held that it was rational to draw distinctions between churches and a number of other uses, like kennels, riding academies, and outdoor recreation facilities, which are low-intense uses of land, and held only that it might be irrational to treat a large church differently than a full-scale country club. See *id.* at 136-42.

---

of their section 2(b) claim. In any event, like the petition, the Eleventh Circuit's view of appropriate equal protection review in *Midrash Sephardi* fails to take account of *Locke*.

Nor did the Fourth Circuit apply heightened scrutiny in *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989), which petitioners also cite. In that case, there was evidence that the city council was motivated by animosity expressed by residents when it denied a conditional use permit for the operation of a palmistry and fortune-telling business. See *id.* at 311-12. The decision applied no form of heightened scrutiny, but instead turned on the settled principle that "government officials simply cannot act solely in 'reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety [or otherwise] dealing with zoning.'" *Id.* at 311 (citation omitted). Where such officials base their actions on animus toward a politically unpopular group, they act "'arbitrarily' and 'capriciously.'" *Ibid.* In this case, as we explain above, there is no claim that the Chicago Zoning Ordinance reflects animosity toward religion.

5. Even petitioners do not doubt that under rational basis review, Chicago's zoning ordinance easily passes muster. To begin with, the overall zoning system, which divides the City into districts and designates compatible uses for each district, has long been recognized as a legitimate way to regulate land use. See, *e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). And in determining where churches fit into such a zoning scheme, Chicago's zoning ordinance recognizes that churches are unlike any other use, requiring unique opportunities for prayer, quiet reflection, and worship, that are not comparable to any secular assembly use. This makes religious land use readily distinguishable from secular uses of land. Cf. *Locke*, 124 S. Ct. at 1313 ("the subject of religion is one . . . that find[s] no counterpart with respect to other callings or professions"). The ordinance also fosters the important role that churches play in community life by allowing churches the unconditional right to locate in R districts, while further allowing the ZBA to grant special use permits for church use in most B and C districts, when the

church will fit among the particular business and commercial uses there. Although churches are not allowed in C4 and M districts, that is because they are too likely to be incompatible with the transportation and manufacturing uses there, which create noise, dust, and traffic that may be disruptive to church activities, and which may ultimately lead to friction between potentially incompatible uses. Whether a particular church claims to be indifferent to these neighborhood realities is not important. Under rational basis review, a municipality is entitled to legislate based on the possibility that church leaders, once permitted to locate in a commercial, manufacturing, or business district, may subsequently decide to agitate for a reduction in incompatible uses nearby, or that existing or proposed manufacturing uses might not want to invest in a location where this kind of risk to their investment is present. Either way, it is at least plausible that locating a church in a manufacturing district will produce exactly the clash of land uses that zoning is designed to avoid.

6. Petitioners claim that "if something more than bare rational basis review is applied here," the zoning ordinance impermissibly discriminates between religious and some secular assembly uses—including community centers, meeting halls, lodges, restaurants, art galleries, theaters, taverns, funeral parlors, universities, music schools, and community homes. See Pet. 15. As for clubs, lodges, community centers, and meeting halls, the zoning ordinance was amended in 2000 to place the same restrictions on those uses in B, C, and M districts, and for that reason the court of appeals found that petitioners' challenge to the earlier version of the ordinance is moot. See Pet. App. 14a-15a n.6. Although petitioners assert that their claim for damages under the old ordinance is not moot (see Pet. 5 n.2, 15), they have waived any challenge to the mootness holding below by not questioning that holding in the questions that they present in their petition for

certiorari. Arguments not fairly included in the questions presented are waived. See this Court's Rule 14.1(a).[5]

Waiver aside, the former version of the zoning ordinance survives equal protection review. As we explain above, churches are unlike any other secular assembly use in that they alone are dedicated to providing regular opportunities for quiet reflection, worship, and prayer. They therefore present greater potential for conflict with other uses in commercial, manufacturing, and business districts than do secular assembly uses. Moreover, no secular assembly use may locate in R districts, while religious land use receives this special dispensation.

And as for the remaining secular assembly uses, there is an eminently rational basis for the distinctions drawn by Chicago's ordinance. Most secular assembly uses are commercial, involving the sale of goods and services in some

---

[5] In any event, the court of appeals correctly held that the damages claims are moot. When a challenged law impermissibly discriminates between a favored and a disfavored class, that discrimination may be remedied "either by extending benefits to the previously disfavored class or by denying benefits to both parties." *Orr v. Orr*, 440 U.S. 268, 272 (1979). Accord, *e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 738 (1984); *Califano v. Westcott*, 443 U.S. 76, 89-91 (1979). Accordingly, when fashioning a remedy for improper discrimination, a court should determine whether the legislature would have intended that the benefit be extended to or withdrawn from all who are similarly situated. See, *e.g.*, *Mathews*, 465 U.S. at 739 n.6; *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 152-53 (1980); *Westcott*, 443 U.S. at 94. In this case, the City Council's preference is clear. In February 2000, the zoning ordinance was amended to withdraw from secular assembly uses any entitlements not also available to churches rather than expand churches' rights to locate in commercial areas. Given this intent, there is no basis for a damages remedy for plaintiffs' inability to locate as a matter of right in nonresidential districts prior to February 2000. After all, damages cannot be awarded absent proof of an actual loss caused by a constitutional violation. See, *e.g.*, *Memphis Community School District v. Stachura*, 477 U.S. 299, 308 (1986).

respect, or at least tend to invite traffic that may cross over and patronize other commercial uses in an area. As for labor organization offices, these facilities are a good fit in M districts for another reason—it makes sense to allow such offices close to the manufacturers where members of labor organizations often work. The zoning ordinance is a carefully crafted scheme, designed to ensure that all land uses fit together in one harmonious whole; the treatment of religious land use under Chicago's zoning ordinance is rational and, indeed, generous.

II. THE CONFLICT AMONG THE CIRCUITS ABOUT THE CONTOURS OF HYBRID RIGHTS PROVIDES NO BASIS FOR PLENARY REVIEW.

In *Smith*, the Court noted that in a few earlier cases, even neutral laws of general applicability were held unconstitutional when they "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . ., or the right of parents . . . to direct the education of their children . . . ." 494 U.S. at 881. Petitioners note a conflict among the circuits about whether a plaintiff can elevate scrutiny of a free exercise claim by coupling it with another constitutional claim. See Pet. 16-19. That conflict, however, provides no basis for plenary review in this case.

1. Petitioners have waived a hybrid rights claim because it is not fairly included in the questions presented in the petition for certiorari. Petitioners' first question presented concerns only the Equal Protection Clause, and their second concerns the nature of a "substantial burden" within the meaning of the Free Exercise Clause and RLUIPA. While an issue may be fairly included in a question presented if it is a "'predicate to intelligent resolution' of the question on which we granted certiorari" (*Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5

(1980)), resolving the conflict pertaining to hybrid rights is not a predicate to the resolution of either of the questions presented.

2. Waiver aside, the conflict petitioners identify does not extend to a case like this one, where the free exercise claim is brought in tandem with the equal protection claim—the only companion constitutional claim that petitioners press in their petition for certiorari. Petitioners identify no case imposing heightened review of a free exercise claim based solely on a companion equal protection claim. *Smith* itself refers only to cases asserting affirmative constitutional entitlements, such as the right to free speech or to raise one's children free from undue governmental interference. See 494 U.S. at 882. Most of the cases in which courts have discussed hybrid rights that support heightened scrutiny of a free exercise claim have involved constitutional entitlements, such as free speech. See, *e.g.*, *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285, 1290 (10th Cir. 2004); *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692, 707-11 (9th Cir. 1999), vacated as unripe, 220 F.3d 1134 (2000) (en banc); *Cornerstone*, 948 F.2d at 468-71. But an equal protection claim asserts no substantive constitutional entitlement and accordingly adds nothing to a free exercise claim. Indeed, there is no conflict in the circuits on whether some form of heightened scrutiny is required when a Free Exercise Clause claim is made in conjunction only with an equal protection claim. Nor is a conflict likely to develop in light of this Court's recent decision in *Locke* holding that when a Free Exercise Clause claim lacks merit, a companion equal protection claim requires only rational basis review. See 124 S. Ct. at 1312 n.3.

3. This is not the appropriate case to resolve the conflict about how to treat a hybrid rights claim because petitioners' claim flounders under any of the approaches the courts of appeals have taken.

The Second and Sixth Circuits have rejected the idea of a hybrid rights claim that makes the level of scrutiny of a free exercise claim vary simply because another constitutional right is implicated. See, *e.g.*, *Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003); *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993).[6] In the decision below, the Seventh Circuit joined the First and Third Circuits in holding that the concept of hybrid rights entitles a plaintiff to heightened review under the Free Exercise Clause of a neutral law of general applicability only if the plaintiff also establishes that some other constitutionally protected interest is infringed by the challenged law. See Pet. App. 19a; *Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144, 165 & n.23 (3d Cir. 2002), cert. denied, 123 S. Ct. 2609 (2003); *Brown v. Hot, Sexy & Safer Products, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995), cert. denied, 516 U.S. 1159 (1996).[7] There is no meaningful difference between these two approaches, since neither calls for heightened scrutiny merely because a free exercise claim is conjoined with some other asserted constitutional violation.

Petitioners rely on statements of the Ninth and Tenth Circuits that a plaintiff can obtain heightened scrutiny under the Free Exercise Clause if he asserts a "colorable" companion

---

[6] This appears to be Justice Souter's view as well. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring in part and concurring in the judgment). Similarly, the separate opinion in *Smith* rejected the concept of hybrid rights, and took pains to note that the cases the majority had characterized as involving hybrid rights invalidated laws only after concluding that they placed undue burdens on religiously motivated conduct. See 494 U.S. at 894-97 (O'Connor, J., concurring in the judgment).

[7] This approach is faithful to *Smith*. In that case, as we explain above, the Court invoked the concept of hybrid rights to explain decisions in which a free exercise claim received heightened scrutiny because a challenged law impinged upon other "constitutional protections" in addition to imposing a burden on religiously motivated conduct. See 494 U.S. at 881.

claim under the Constitution. See *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999); *Thomas*, 165 F.3d at 705-06; *Swanson v. Guthrie Independent School District No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998). At least one indication that this asserted conflict lacks substance is that the Seventh Circuit itself perceived no difference between its position and that of the Ninth and Tenth circuits. See Pet. App. 19a.

And the Seventh Circuit is correct on this score. Although a hybrid rights claim will receive heightened scrutiny based on a "colorable" companion claim that is conjoined with a free exercise claim in the Ninth and Tenth Circuits, the standard for a "colorable" claim in those circuits is far from minimal. As the Ninth Circuit observed in *Thomas*, "the mere fact that a companion right is 'implicated' cannot serve as the touchstone for heightened scrutiny." 165 F.3d at 704. Rather, the plaintiff must prove a "likelihood of success on the merits" on the companion claim before the level of scrutiny will be raised on a free exercise challenge. *Id.* at 706. Accord *Axson-Flynn*, 356 F.3d at 1297. Accordingly, petitioners cannot prevail even under the view taken by the Ninth and Tenth Circuits, for they have no colorable companion claim as those circuits have defined that concept. To the contrary, petitioners' free speech, free assembly, equal protection, and due process claims have been fully litigated and decided against them. See Pet. App. 20a-24a.[8]

Finally, even if petitioners could show a likelihood of success on some companion claim, it would not advance the ball very far for them. A plaintiff who successfully invokes hybrid rights must then show "whether the government has

---

[8] The supposed conflict over hybrid rights claims also has little practical significance. As the California Supreme Court recently observed, despite the varying formulations of the hybrid rights concept that have been employed, no court has ever relied on that theory to grant relief or even to apply strict scrutiny. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 87-88 (Cal. 2004).

placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Thomas*, 165 F.3d at 711 (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)). The court of appeals held, however, that the Chicago Zoning Ordinance imposed no substantial burden on religious belief. See Pet. App. 13a-15a. And as we now explain, the court of appeals' holding on that point also does not merit plenary review.

III. A ZONING ORDINANCE THAT LEAVES OPEN REASONABLE LOCATION OPPORTUNITIES FOR A CHURCH IMPOSES NO SUBSTANTIAL BURDEN ON RELIGION.

Petitioners claim that the Chicago Zoning Ordinance imposes a substantial burden on religion within the meaning of this Court's decisions under the First Amendment's Free Exercise Clause and section 2(a) of RLUIPA. See Pet. 19, 25. The court of appeals rejected this argument, concluding that the record shows only that the zoning ordinance imposes the type of regulatory and financial burdens typical of zoning regulation. See Pet. App. 13a-14a. Plenary review of this fact-bound holding is not warranted.

1. Petitioners take issue with the Seventh Circuit's formulation of the substantial burden test and argue that there is a split in authority about what amounts to a substantial burden. See Pet. 19. Although the circuits have used various formulations to describe what amounts to a substantial burden, see Pet. 23-24, these are but minor variations in the way the substantial burden test has been articulated, and reflect no great divide on the issue. In fact, whether addressing claims under the Free Exercise Clause or RLUIPA, the courts of appeals have uniformly rejected claims that land-use regulations impose a substantial burden on religion when they leave open reasonable opportunities to locate a

church or other religious facility, even if they add expense and inconvenience to the search for an appropriate location. See, *e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, No. 03-13858, 2004 WL 842527 at *9-10 (11th Cir. Apr. 21, 2004) (finding no substantial burden under RLUIPA where church claimed that a church in the residential area would be too inconvenient for church members); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1033-35 (9th Cir. 2004) (finding no substantial burden under RLUIPA on a religious college where there was "no evidence in the record demonstrating that College was precluded from using other sites within the city"); *Christian Gospel Church*, 896 F.2d at 1224 (rejecting free exercise claim because the city's refusal to grant a conditional use permit imposed merely a burden "of convenience and expense, requiring [the church] to find another home or another forum for worship"); *Rector, Wardens, and Members v. City of New York*, 914 F.2d 348, 353-56 (2d Cir. 1990) (landmark commission's refusal to permit new development on landmarked property imposed no substantial burden even though it deprived church of substantial revenue), cert. denied, 499 U.S. 905 (1991); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 824-26 (10th Cir. 1988) (rejecting free exercise claim where churches were permitted in thirteen of sixteen residential districts, and holding that "the financial consequences to the church do not rise to infringement of religious freedom"), cert. denied, 490 U.S. 1005 (1989); *Grosz v. City of Miami Beach*, 721 F.2d 729, 740 (11th Cir. 1983) (rejecting free exercise claim because zoning ordinance would permit religious activities in half the city's territory); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir.) (zoning law that allowed worship in any existing building and construction of a church building in 10% of the city did not substantially burden church even if available lots "may not meet [the church's] budget or satisfy its tastes"), cert. denied,

464 U.S. 815 (1983); *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 86 P.3d 1140, 1156-57 (Or. Ct. App. 2004) (rejecting RLUIPA challenge to denial of conditional use permit where church was able to meet elsewhere without unreasonable expense or inconvenience); *North Pacific Union Conference Association v. Clark County*, 74 P.3d 140, 146-47 (Wash. Ct. App. 2003) (upholding, under RLUIPA and Free Exercise Clause, denial of special use permit in agricultural district); *City of Colorado Springs v. Blanche*, 761 P.2d 212, 216-17 (Colo. 1988) (en banc) (upholding ordinance confining religious land use to specified zoning districts); *Minney v. City of Asuza*, 330 P.2d 255, 261-63 (Cal. Ct. App. 1958) (upholding ordinance excluding churches from most of the city).

Petitioners contend that a more lenient standard is found in the Tenth Circuit's decision in *Thiry v. Carlson*, 78 F.3d 1491 (10th Cir.), cert. denied 519 U.S. 821 (2003). There, the plaintiffs claimed that the state's condemnation of their daughter's gravesite in order to build a highway substantially burdened their religion in violation of RFRA because the site had special spiritual meaning and was often used for prayer. See *id.* at 1493. The court concluded that the condemnation would not substantially burden religion because "[w]hile the Thirys establish that they will be both distressed and inconvenienced over the relocation of their daughter's gravesite and loss of access to that particular site itself, they also testified that they will still continue their religious beliefs and practices even if the condemnation proceeds as planned." *Id.* at 1495. The court also noted that the plaintiffs "have worshiped, prayed, and drawn near to God in places other than the gravesite area." *Ibid.* This analysis, emphasizing the existence of reasonable opportunities to worship despite a governmental action restricting the use of one location, reflects no meaningful difference from the approach of other circuits.

Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988), is not indicative of a circuit split either. That case turned on evidence that the city's decision to deny a permit for a religious center at a particular location was based on an animosity toward the Islamic faith. Thus, "the City did not act in a religiously neutral manner." *Id.* at 302. The Free Exercise Clause forbids laws that discriminate against particular religions or sects. See, *e.g.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535-40 (1993). But in this case, petitioners challenge Chicago's zoning ordinance on its face, and the ordinance treats all religions evenhandedly. Nor is there any claim that "the object of [this] law is to infringe upon or restrict practices because of their religious motivation . . . ." *Id.* at 533. Even petitioners do not doubt that the object of Chicago's ordinance is to promote harmonious land use.

Nor is there any inconsistency between the Seventh Circuit's decision and *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992). In that case, the court held that a landmark ordinance "so grossly diminishes the value of the Church's principal asset that it impermissibly burdens First Covenant's right to free exercise of religion." *Id.* at 184.[9] There is no comparable evidence in this case of the financial impact of Chicago's ordinance on petitioners.

In short, there is no conflict in the lower courts on the question whether a zoning law that directs churches to residential zoning districts imposes an impermissible burden on religion.[10]

---

[9] In *First Covenant Church*, moreover, the court based its decision on the state's constitution which, the Court observed, provided greater protection than the Free Exercise Clause. See 840 P.2d at 185-88.

[10] Petitioners make brief reference to the individualized exemptions doctrine that sometimes triggers strict scrutiny of challenged laws under the Free Exercise Clause. See Pet. 23-24 n.8. Neither of the questions

2. The court of appeals' decision faithfully adheres to this Court's free exercise jurisprudence. This Court has long recognized that government action does not substantially burden religion merely because it imposes costs on religious organizations or groups. See, *e.g.*, *Smith*, 494 U.S. at 889; *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 390 (1990); *Hernandez*, 490 U.S. at 699. Nearly all government regulation imposes some sort of cost; that does not make it impermissible or even suspect.

This Court has found challenged laws to impose a substantial burden on religious exercise only when the law has a coercive effect by forcing a litigant to surrender his religious beliefs or else face the loss of an important government benefit. See, *e.g.*, *Smith*, 494 U.S. at 883-84.[11] In *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, the denial of unemployment benefits because the plaintiff refused to work on Saturday in violation of her religious beliefs plainly had a "tendency to inhibit constitutionally protected activity." *Id.* at

---

presented in the petition encompasses this doctrine, however, and hence petitioners have waived reliance on it. In any event, that doctrine provides only that "where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. Here, there is no claim that Chicago will not entertain a claim of religious hardship when evaluating an application for rezoning or a special use. Moreover, even petitioners acknowledge that this doctrine requires strict scrutiny only "if a substantial burden can be shown." Pet. 23 n.8. Accordingly, even if there is a conflict in the lower courts on the reach of the individualized exemptions doctrine, it is immaterial to this case because Chicago's ordinance imposes no substantial burden.

[11] Even the separate opinion in *Smith* acknowledged that an impermissible burden on religion is only one that is "imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community." 494 U.S. at 897 (O'Connor, J., concurring in the judgment).

404-06 & n.6. Similarly, in *Thomas v. Review Board*, 450 U.S. 707 (1981), the plaintiff's choice between participating in the production of weapons in violation of his religious beliefs or receiving unemployment benefits had a "coercive impact" that put "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* at 717. Chicago's zoning ordinance applies no comparable pressure to abandon religious beliefs or practices. If it were not plain enough from the zoning ordinance itself, experience shows that the City's zoning scheme, which has been in place since 1957, does not inhibit religion. Thousands of churches have found homes within Chicago. Indeed, each of the five individual petitioners has successfully located in Chicago, either as of right in an R district or by a special use permit for a B or C district.

Indeed, this Court has determined that the incidental impact on religion posed by zoning ordinances like the City's falls so far short of a substantial burden that it dismissed a similar case for lack of a substantial federal question. In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 203 P.2d 823 (Cal. Ct. App.), appeal dismissed, 338 U.S. 805 (1949), the California Appellate Court rejected free exercise and due process challenges to an ordinance that permitted churches only in the most intensive of the municipality's four zoning classifications, and this Court found no substantial federal question to be presented. As this Court shortly thereafter explained its ruling:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group

> contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.

American Communications Association v. Douds, 339 U.S. 382, 397 (1950). This is an even easier case than *Corporation of Presiding Bishop* because Chicago's zoning ordinance allows churches in all residential areas by right and in other areas if they obtain special use permits—far more land, and more desirable land, than was available in *Corporation of Presiding Bishop*.

In short, what petitioners complain about here cannot fairly be characterized as a "substantial burden" on religion, but only an obstacle to obtaining whatever property the church prefers—for reasons of cost, convenience, or anything else. Neither the Free Exercise Clause nor RLUIPA frees churches from reasonable zoning restrictions. All zoning laws restrict land use choices in order to promote harmonious land use, and there is nothing impermissible about that kind of burden.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
SUZANNE M. LOOSE *
Assistant Corporation Counsel
Suite 800
30 North LaSalle Street
Chicago, Illinois 60602
(312) 744-4439

* Counsel of Record

Attorneys for Respondent

May 7, 2004